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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEANTE REGINALD SMITH,

Defendant and Appellant.

B286676

(Los Angeles County
Super. Ct. No. MA052542)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed; remanded with directions.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Deante Smith appeals from a judgment entered following an October 17, 2017 resentencing hearing. He contends he is entitled to another sentencing hearing in light of Senate Bill No. 620,¹ which amended Penal Code section 12022.5, effective January 1, 2018, to give trial courts discretion to strike certain firearm enhancements, and Senate Bill No. 1393,² which amended Penal Code sections 667 and 1385, effective January 1, 2019, to give trial courts discretion to strike prior serious felony enhancements. For the reasons explained below, we remand the matter for the trial court to determine whether to strike the enhancements under Penal Code sections 12022.5 and 667, and if an enhancement is stricken, to resentence Smith.

BACKGROUND³

At around 1:00 a.m. on March 31, 2011, victims Donald and Melissa Howard were sitting in a car in the driveway of Melissa's friend's house. Smith exited the house, and Donald asked him if Melissa could speak with her friend. Smith reentered the house and then reemerged, holding a gun. Smith walked to the driver side of the car and struck Donald in the face with the gun. Then Smith walked to the passenger side of the car and struck Melissa on the head with the gun, knocking her to the ground. The jury viewed photographs of Donald's and Melissa's injuries from the

¹ Senate Bill No. 620 (2017–2018 Reg. Sess.) Statutes 2017, chapter 682, section 1.

² Senate Bill No. 1393 (2017–2018 Reg. Sess.) Statutes 2018, chapter 1013, sections 1-2.

³ We take some of the background facts from our prior opinion affirming Smith's convictions in this case. (*People v. Smith* (Jan. 9, 2015, B250674) [nonpub. opn.])

beatings (a painful cut, requiring stitches and leaving a scar, for Donald; and painful bruising for Melissa). (*People v. Smith*, *supra*, B250674, pp. 1-2.)

In 2013, a jury found Smith guilty of two counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2))⁴ and two counts of battery causing serious bodily injury (§ 243, subd. (d)). The jury also found true the special enhancement allegations that, in the commission of the assaults with a firearm, Smith personally inflicted great bodily injury (§ 12022.7, subd. (a)) and, in the commission of all offenses, Smith personally used a firearm (§ 12022.5, subd. (a)). (*People v. Smith*, *supra*, B250674, p. 2.)

After waiving jury trial on prior conviction allegations, the trial court found true that Smith had two prior convictions for serious or violent felonies within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)), two prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and had served two prior prison terms within the meaning of section 667.5, subdivision (b). (*People v. Smith*, *supra*, B250674, p. 4.)

Initial Sentencing Hearing

On July 1, 2013, the trial court held the initial sentencing hearing in this matter.⁵ At the outset, the court heard and denied Smith’s motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Smith argued the court should dismiss one of his prior strike convictions because they both arose from the same criminal case and involved the same course of conduct.

⁴ Further statutory references are to the Penal Code.

⁵ On the Attorney General’s motion, we augmented the record on appeal to include the reporter’s transcript from the July 1, 2013 sentencing hearing.

In denying the motion, the court outlined Smith's criminal history since the time he was convicted of the two prior strike offenses in 1998 and commented, "The defendant does indeed appear to be someone who is in that pattern of the revolving door of the criminal justice system."

The trial court sentenced Smith to 81 years to life in prison: on count 2 for assault with a firearm (deemed the base count), 25 years to life under the Three Strikes law, plus consecutive terms of 10 years (the high term) for the firearm enhancement, three years for the great bodily injury enhancement, five years for each of the two prior serious felony enhancements, and one year for the prior prison term enhancement;⁶ and on count 1 for assault with a firearm, 25 years to life under the Three Strikes law, plus consecutive terms of four years (the midterm) for the firearm enhancement and three years for the great bodily injury enhancement.

In selecting the high term on the firearm enhancement in count 2, the court stated: "I choose the high term after considering all of the circumstances in aggravation in this case, including, but not limited to, the fact that this crime involved great violence, great bodily harm, and the threat of great bodily harm and acts disclosing a high degree of cruelty, viciousness or callousness. [¶] I do find that the victims in this case, based on how the crime was committed, were in a particularly vulnerable state and were basically ambushed by the defendant. I do note

⁶ The trial court struck the other prior prison term allegation because the prior conviction on which it was based was used to enhance Smith's sentence under section 667, subdivision (a)(1) and the Three Strikes law.

that the defendant has engaged in violent conduct, which does indicate that he is a serious danger to society.”

In imposing consecutive terms on counts 1 and 2, the trial court stated: “In this case, there were separate victims and separate attacks. The way the testimony came out at trial, after the attack on Mr. Howard, as Mr. Howard was basically trying to leave, then the attack to Mrs. Howard began. He had to come back to rescue his wife. So two violent crimes committed against two separate people. This wasn’t a simultaneous robbery with multiple victims. These are two distinct acts against two distinct victims. Given that fact and the fact that the defendant’s prior convictions are numerous and of increasing seriousness, the fact that the defendant was on parole at the time the crime was committed, I choose to serve these two sentences consecutively if there is any discretion at all.”

The trial court then imposed and stayed under section 654 the sentence on the two counts for battery causing great bodily injury (counts 4 & 5), finding the offenses arose from the same set of operative facts as counts 1 and 2. For each battery, the court imposed and stayed 25 years to life under the Three Strikes law, plus a consecutive four years (the midterm) for the firearm enhancement.

On January 9, 2015, this court affirmed the judgment against Smith, ordering the trial court to correct clerical errors. (*People v. Smith, supra*, B250674, p. 11.)

Resentencing Hearing

Smith filed a petition for writ of habeas corpus in the California Supreme Court (case No. S232701). The Court issued an order to show cause returnable before the trial court. On September 17, 2017, the trial court granted the petition without

an evidentiary hearing. The court found, under the reasoning in *People v. Vargas* (2014) 59 Cal.4th 635, Smith's two prior convictions for robbery and carjacking, which arose from the same criminal case, could not both be used as prior strikes under the Three Strikes law because "both acts occurred in a very short span of time, with a single objective of taking property from the presence of a lone victim." The court concluded Smith was entitled to a new sentencing hearing.

At an October 17, 2017 hearing, the trial court set aside Smith's initial sentence and resentenced him to 36 years and four months in prison: on count 2 for assault with a firearm (the base count), the high term of four years, doubled to eight years under the Three Strikes law, plus consecutive terms of 10 years (the high term) for the firearm enhancement, three years for the great bodily injury enhancement, five years for each of the two prior serious felony enhancements, and one year for the prior prison term enhancement;⁷ and on count 1 for assault with a firearm, one year (one-third the midterm of three years), doubled to two years under the Three Strikes law, plus consecutive terms of one year and four months (one-third the midterm of four years) on the firearm enhancement and one year (one-third the term of three years) for the great bodily injury enhancement.

⁷ As set forth above, at the initial sentencing hearing, the trial court struck the other prior prison term allegation because the prior conviction on which it was based was used to enhance Smith's sentence under section 667, subdivision (a)(1) and the Three Strikes law. At the resentencing hearing, the court indicated that this other prior prison term enhancement remained stricken.

In selecting the high term on the firearm enhancement in count 2, the court stated: “At the original sentencing, I had stated all of the factors in aggravation justifying the imposition of the high term. Those factors still remain in full force and effect.”

The trial court then imposed and stayed under section 654 the sentence on the two counts for battery causing great bodily injury (counts 4 & 5). For each battery, the court imposed and stayed the high term of four years for the offense, doubled to eight years under the Three Strikes law, plus a consecutive 10 years (the high term) for the firearm enhancement.

DISCUSSION

Section 12022.5 Firearm Enhancements

In October 2017, the Legislature amended section 12022.5 to provide the “court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.” (§ 12022.5, subd. (c); Stats. 2017, ch. 682, § 21.)⁸ The amendment went into effect on January 1, 2018, before the judgment of Smith’s conviction became final. (See Cal. Const., art. IV, § 8, subd. (c).) Smith contends, the Attorney General concedes, and we agree, the new legislation applies retroactively in Smith’s case. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-76 [where statute enacted during pending appeal gave trial court discretion to impose lesser penalty, remand was required for resentencing].)

Smith contends the amendment requires the trial court be given an opportunity to exercise its new discretion to strike the

⁸ Under section 1385, the court may, in furtherance of justice, “strike or dismiss an enhancement” or “strike the additional punishment for that enhancement.” (§ 1385, subds. (a) & (c); see *People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

firearm enhancement imposed as part of his sentence. The Attorney General argues remand for resentencing is not required in this case because the “record provides a ‘clear indication’ the court would not have stricken a firearm enhancement.”

“[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’ [Citation.] But if “the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.” ’ ” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

In *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, the trial court increased the defendant’s sentence beyond what it believed the Three Strikes law required, by imposing the high term and two additional discretionary one-year enhancements. The court stated during sentencing that imposing the maximum sentence would be appropriate. (*Ibid.*) On appeal, the defendant requested that his case be remanded to the trial court for resentencing after our Supreme Court decided in *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497 that a trial court has discretion to strike prior strikes in determining a defendant’s sentence. The appellate court denied the request, noting that because the trial court had indicated both in its comments and by the sentence itself that a maximum sentence was appropriate,

“no purpose would be served” by a remand. (*Gutierrez*, at p. 1896.) During the initial sentencing hearing in *Gutierrez*, the trial court stated, “ ‘this is the kind of individual the law was intended to keep off the street as long as possible,’ ” and indicated it would not have exercised its discretion to lessen the sentence. (*Ibid.*)

In “assessing whether to remand a case for resentencing in light of [Senate Bill No.] 620,” we are guided by the principle that “a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425.)

At the time of Smith’s sentencing, the trial court had no discretion to strike the firearm enhancement and did not indicate how it would exercise such discretion if available. Notwithstanding that, the Attorney General argues remand is not necessary because the “court’s selection of the upper-term firearm enhancements for the principal determinate term and the stayed offenses, selection of upper-term sentences for the non-subordinate substantive offenses, selection of consecutive sentencing, and decision not to strike the remaining ‘strike’ all establish a clear indication that the court would not strike any firearm enhancement in this case.” We disagree with the Attorney General’s argument. The fact the trial court imposed a longer prison term than required does not necessarily mean the court would have declined to strike the enhancement if, at the time of the hearing, section 12022.5 afforded the court such discretion.

Moreover, because the law at the time of sentencing did not allow the trial court to strike firearm enhancements, Smith had

no reason to argue the court should strike his enhancement. As our Supreme Court explained in a somewhat similar circumstance in *People v. Rodriguez* (1998) 17 Cal.4th 253, 258, “The evidence and arguments that might be presented on remand cannot justly be considered ‘superfluous,’ because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion.” (*Ibid.* [requiring the presence of defendant and counsel at a hearing in which the court would determine whether it could reasonably exercise its discretion to strike a prior strike].)

For these reasons, we remand the matter for the trial court to determine whether to strike the firearm enhancement.

Section 667 Prior Serious Felony Enhancements

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to give trial courts discretion to strike or dismiss prior serious felony enhancements. (Stats. 2018, ch. 1013, §§ 1-2.) Smith argues, the Attorney General concedes, and we agree the new legislation applies retroactively in Smith’s case so long as the judgment of Smith’s conviction was not final as of January 1, 2019, the effective date of Senate Bill No. 1393. (*People v. Garcia* (2018) 28 Cal.App.4th 961, 971-972.)⁹

⁹ In his supplemental respondent’s brief, the Attorney General argues Smith’s contention under Senate Bill No. 1393 was “not yet ripe” because he raised it in a supplemental brief filed in November 2018, prior to the January 1, 2019 effective date of the legislation. We are deciding this appeal after January 1, 2019. Thus, Smith’s contention is ripe.

In his supplemental brief, Smith contends the amendment requires the trial court in his case be given an opportunity to exercise its new discretion to strike the five-year prior serious felony enhancements imposed as part of his sentence. The Attorney General argues “[r]emand for resentencing is unwarranted because the trial court’s sentencing choices clearly indicated that it would not dismiss the enhancements in any event.”

We remand the matter for the trial court to determine whether to strike the prior serious felony enhancements for the same reasons discussed above regarding the firearm enhancement. At the time of Smith’s sentencing, the law did not allow the court to strike the prior serious felony enhancements, the court did not indicate how it would exercise such discretion if available, and Smith did not (and had no reason to) present argument urging the court to exercise a discretion it did not have.

Upon remand, if the trial court strikes an enhancement, it must resentence Smith.

DISPOSITION

The convictions are affirmed. The matter is remanded to the trial court to determine whether to strike the enhancements under Penal Code sections 12022.5 and 667, and if an enhancement is stricken, to resentence Smith.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.